SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

NO. 480

ARIZONA CORPORATION COMMISSION, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

On Appeal from The United States District Court for The District of Nebraska

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This is an appeal from the order of the United States District Court for the District of Nebraska dismissing complaints to set aside an order of the Interstate Commerce Commission. Appellants are twenty-one state regulatory commissions.[1]

[1] Appellants are: in addition to the Arizona Corporation Commission: Arkansas Public Service Commission; California Public Utilities Commission; Colorado Public Service Commission; Florida Public Service Commission; Idaho Wheat Commission and Idaho Public Utilities Commission; Iowa State Commerce Commission; Kansas State Corporation Commission; Louisiana Public Service Commission; Minnesota Railroad and Warehouse Commission; Missouri Public Service Commission; Montana Board of Railroad Commissioners; Nebraska State Railway Commission; Nevada Public Service Commission; New Mexico Public Service Commission; North Dakota Public Service Commission; Oklahoma Corporation Commission; Public Utility Commissioner of Oregon; Texas Railroad Commission; Washington Utilities and Transportation Commission; and Wyoming Public Service Commission.

OPINIONS BELOW

The Judgment of the District Court entered May 28, 1969, but not yet reported, is set forth as Appendix A.* The Memorandum Opinion of Judge Robinson is set forth as Appendix B. The concurring opinion of Judge Lay is set forth as Appendix C; and the dissenting opinion of Judge Van Pelt is set forth as Appendix D. The Commission's decision in I.C.C. Docket Nos. 31358, 33145, and 34405, dated January 17, 1968, is reported at 332 I.C.C. 176, and is set forth as Appendix E.

JURISDICTION

The appeal herein is from a final judgment of a three-judge United States District Court for the District of Nebraska, constituted under 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325 to review the order of the Interstate Commerce Commission in its Docket Nos. 31358, 33145, and 34405. The final judgment of the three-judge court here appealed from was entered May 28, 1969. These Appellants filed their Notice of Appeal on June 27, 1969. This Court has jurisdiction to hear this direct appeal, under 28 U. S. C. §§1253 and 2101(b). *Public Service Commission of Utah v. United States*, 356 U. S. 421 (1958); *New York v. United States*, 331 U. S. 284 (1947).

STATUTE INVOLVED

Section 1(14) (a) of the Interstate Commerce Act, as amended in 1966, provides (49 U.S.C. §1(14)(a)):

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint,

* These Appendices are presented separately, bound as a Joint Appendix to the Jurisdictional Statements of these Appellants and the railroad appellants, Union Pacific Railroad Company, et al.

establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply; and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest."

QUESTION PRESENTED

The 1966 Congressional amendment to Section 1(14)-(a) of the Interstate Commerce Act states that the Com-

mission, in fixing compensation to be paid for the use of any freight car, shall consider "factors affecting the adequacy of the national freight car supply" and prescribe car hire rates "on the basis of such consideration." The question here presented is whether the Commission acted contrary to the statute when it prescribed new rates for the use of freight cars without considering the effect of those new rates upon the freight car supply.

STATEMENT

In this proceeding, twenty-one state regulatory commissions (hereinafter referred to as the States) filed complaints in the District Court to set aside an order of the Interstate Commerce Commission which would drastically reduce the daily rental rate for railroad freight cars. The reason for the action of the States in the Court below, and for this appeal, is that the maintenance of an adequate level of per diem rental rates is vitally necessary to the economy of our states.

Car rental rates have a vital impact upon the willingness of the railroads to build an adequate number of freight cars to serve their shippers and upon the efficiency with which such cars are used. Low rental rates make it cheaper for railroads to rent the cars of other carriers than to build their own. Likewise, low rental rates per day make it cheaper for a renting carrier to hold a car idle, and thus reduce the incentive to return that car to its owner. These two factors—the number of freight cars in service, and the efficiency with which they are used—determine whether or not the nation's

car supply will be adequate to serve the needs of the nation's shippers.

The economies of our states have been hampered by recurring car shortages of increasing magnitude. Our regulatory commissions have been besieged with complaints from shippers that they are unable to obtain cars when needed. Farmers have experienced "blocked elevators"—elevators which are full of grain because no boxcars are available, and have therefore been unable to sell more grain. Lumbermen often find it impossible to ship their products to market.

Producers of goods other than basic commodities have found themselves similarly handicapped in their efforts to reach consumer markets. Manufactured products must be placed in storage because cars are not available for shipment. As a result, handling costs have increased, and as storage capacity nears exhaustion, production has had to be curtailed. Such bottlenecks adversely affect the economy at all levels since when transportation becomes unavailable, producers are compelled to stop taking orders, and must run the risk that orders already taken will have to be cancelled if shipping schedules cannot be met. When mills shut down, employees are forced out of work. In these ways, the freight car shortage depresses the level of economic output and development throughout the areas affected.

In recent years, the shortage of freight cars has grown steadily worse. While our national economy and transportation requirements have burgeoned, our national freight car supply has shriveled. In 1926, total freight

car ownership (excluding refrigerator cars) was 2,427,026. In 1945, it was 1,744,179, about 72% of the 1926 figure. During the first five years of the 1960's, the figures continued to show a steady decline. [Hearings on H.R. 2230, H.R. 7165 and S. 1098 before the Committee on Interstate and Foreign Commerce, House of Representatives, 89th Cong., 1st Sess., (hereinafter cited as "House Committee Hearings"), p. 102]:

January 1, 1961—1,636,695
January 1, 1962—1,579,065
January 1, 1963—1,523,080
January 1, 1964—1,482,122
January 1, 1965—1,457,074

The Chairman of the Interstate Commerce Commission reported to the Senate Committee on Commerce, on May 13, 1969, as follows:

> "Up to 1960, daily shortages of [plain box] cars were on the decline. Since 1960, however, shortages have increased as the ownership of plain boxcars has declined. *Since 1965, average daily reported shortages have increased sharply.* The 1966 daily average shortages for a four-month study period ranged from 3,312 to 13,066. In 1967, reported daily average shortages of all types of cars ranged from 1,428 to 7,970, while in 1968 . . . shortages ranged from 2,810 to 16,376. *This year,* reported daily shortages range from *4,626 on January 11 to a high of 18,480* on March 29." (Statement of Virginia Mae Brown, Chairman, Interstate Commerce Commission, on Railroad Freight Car Shortages, Before the Committee on Commerce, United States Senate, May 13, 1969, p. 13; emphasis supplied).

One reason for the car shortages is that, having little incentive to return freight cars to their owners, the railroad industry has used those cars inefficiently and permitted them to remain idle on an average of over 300 days out of every year. 80 I.C.C. Ann. Rep. 92 (1966). Another reason is that given such inefficient utilization of cars and given the fact that even when cars are in use they are often being used at low rentals on the lines of other railroads, many railroads simply have not replaced as many cars as have become unusable or obsolete. Instead, they have chosen to rent the cars of other carriers. In both respects, the increasing magnitude of car shortages in recent years has been directly related to the low level of per diem rates in effect.

Representatives of the shipping public and the public regulatory authorities of our states have supported legislative efforts to improve car supply for many years. Specifically, the states were in the forefront of efforts to amend the Interstate Commerce Act to provide that the Commission, in fixing car hire rates, should do so in such a way as to promote car supply. Bills to achieve this purpose were introduced in Congress in 1951, 1952, 1953, 1956, 1957, 1958, 1959, 1961 and 1963; but none was successful. And, as the years passed, car supply continued to deteriorate.

In 1965, a major new attempt to amend Section 1(14)(a) of the Act was initiated. Hearings were held in several of the most critically affected areas. Representatives of many of our states, including Senators,

Congressmen, members of state regulatory commissions[8] and large numbers of shippers and shipper groups urged Congress to pass the bill (S. 1098). The bill, as reported out of the House Committee on Interstate and Foreign Commerce, passed the House on May 12, 1966 and the Senate on May 17, 1966. It was signed into law May 26, 1966, with a provision that it become effective September 1, 1966.

As the House Committee stated (House Comm. on Interstate and Foreign Commerce, National Freight Car Shortage, H.R. Rep. No. 1183, 89th Cong., 1st Sess., 2 (1965)):

> "The purpose of the bill is to secure alleviation of the recurring national shortages of railroad freight cars.
>
> "This purpose is to be accomplished by authorizing the Interstate Commerce Commission in its setting of the rates of compensation to be paid for the use of any type of freight car to include such elements as in the Commission's judgment will provide just and reasonable compensation to freight car owners, *contribute to sound car service practices (including efficient utilization and distribution of cars)*, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense."
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> * * *
>
> "There is no need to set forth statistics regarding

[8] See Statement of Jonel C. Hill, Public Utility Commissioner, State of Oregon, House Committee Hearings, p. 181; Letter of Richard H Larson, Nebraska State Railway Commissioner, *Id.*, p. 269; Statement of Patrick D. Sutherland, Washington State Utilities and Transportation Commission, Hearings on S. 179 and S. 1098 before the Subcomm. on Freight Car Shortage of the Senate Comm. on Commerce, 89th Cong., 1st Sess., ser. 89-23, at 56 (1965); Statement of John C. Woelk, Kansas Corporation Commission, *Id.*; p. 385; Letter of Joseph J. Brown, Nebraska State Ry. Commission, *Id.*, p. 274.

the amount or the nature of the shortages or to resolve the conflicting interpretations of those statistics that are given by those concerned with the movement of cars. There is not a single Member of the Congress in the past 20 years who at some time or other has not had brought to his attention the discouraging situation which faces the shippers in his area, and indeed for that matter of the railroads of his area with regard to the availability of cars.

"*Something must be done to meet the needs of the shippers and of the public and of the country.*" (Emphasis added.)

Twenty months after the passage of this amendment, the Commission handed down its order in Docket Nos. 31358, 33145 and 34405 now under review.

The Commission proceeding was conducted to determine the proper compensation for all types of cars for which the railroads were charging per diem rates set by agreement of the Association of American Railroads. The two basic questions in the proceeding were, first, what the level of total compensation for these freight cars should be; and, second, the way in which that compensation should be structured. With respect to the latter question, the rental rates for these freight cars had been entirely on a daily (per diem) basis for generations. The reason for the use of a daily charge instead of a mileage charge was explained in *Palmer v. United States*, 75 F. Supp. 63, 68 (D.D.C. 1947):

"Originally car-hire charges were upon a mileage basis. No rental was paid for a car which was standing still. Therefore, there was no incentive for the hiring road to move the car or to return it. The re-

sults were such as to require a change, and a charge upon a time basis was instituted.

"Obviously, any charge upon a time basis furnishes an incentive for prompt return of the property. When a contractor rents a bulldozer by the day, he has an incentive to use it promptly and return it; the same is true in the case of a book taken from a lending library at a daily charge. The penalty or incentive characteristic of the per diem is merely an inherent quality of a charge based upon time."

This same basis for use of a daily charge was established by the evidence in the instant proceding before the Commission. That evidence showed that a change from a daily rate to a mileage rate, or to a combination of a daily rate and a mileage rate (the so-called time mileage proposal) would have a seriously detrimental effect on car utilization.[8]

The Commission did not consider this evidence, which was uncontroverted in the record, but held instead that this evidence of the deleterious effect of time mileage rates on car supply was irrelevant, stating (332 I.C.C. at 223; App. E, p. 86a):

"Proponents of rates measured solely by the number of days the user retains the car contend that they benefit therefrom in encouraging the movement of cars and assert that this method most effectively aids the national policy of improving car supply and service . . . *Secondary results, however beneficial*, cannot be transformed into a principle to govern the determination of the rates in this case." (Emphasis supplied)

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[8] See Exhibits R-54; R-98, p. 13; R-119, p. 14; R-120, pp. 5-7; R-146, p. 7, and R-154, pp. 10, 27.

The Commission thereupon prescribed a structure of rates in which the per diem component would be drastically reduced (332 I.C.C. at 185, 242; App. 1, pp. 48a, 105a). For example, on the oldest and cheapest cars, the daily charge which is now set at $2.16 would be reduced to 63 cents; while on the most expensive cars, the daily charge now fixed at $12.18 would be reduced to $10.22.

Because of the square inconsistency between what the Commission did and what Congress told it to do, and because of the damage which implementation of the Commission's order would cause the shippers in our states, we appealed to the three-judge District Court for the District of Nebraska to set the order aside. The basic legal issue was whether the Commission was correct in disregarding the impact of time/mileage rates on freight car supply on the theory that such consideration was irrelevant in the face of the statutory directive of Section 1(14)(a) that:

> "*In fixing such compensation* to be paid for the use of any type of freight car, *the commission shall give consideration* to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, *and shall, on the basis of such consideration*, determine . . . [what the rates shall be]." (Emphasis supplied)

The District Court, on May 27, 1969, rendered its Judgment dismissing our complaint. (App. A, p. 1a). The Court split three ways on the question of whether the Commission should have considered car supply. Judge Robinson's opinion held "that the Commission properly rejected a consideration of car supply factors in the

computation of basic per diem" (App. B, p. 26a), holding that the requirement of Section 1(14)(a) had been satisfied by the Commission's action in an earlier proceeding (App. B, p. 20a):

> "The Commission did give consideration to car supply factors before deciding to prescribe only a basic per diem rate in the present order. Less than a month after the statute was amended, the Commission instituted a proceeding to determine appropriate incentive per diem charges. *Incentive Per Diem Charges, supra.* All railroads in the United States were made parties to the *Incentive* proceeding. The Commission gave full consideration to all factors specified in the amendment and concluded that the evidence did not warrant the imposition of an incentive charge at this time."

The *Incentive Per Diem Charges* case cited by Judge Robinson was a proceeding in which the Commission had considered whether it should increase the existing per diem rate to provide an added incentive to more efficient utilization. 332 I.C.C. 11 (1967). In that case, no party proposed, and the Commission did not consider any proposal, that freight car rates should be changed from a daily charge to a time/mileage basis or that the present per diem rates should be reduced for any reason. Since the Commission could not and did not consider in the *Incentive Per Diem Charges* case the serious adverse impact that a time/mileage rate with reduced daily charges would have on freight car supply, Judge Robinson's opinion is simply not responsive to the statutory question presented by the States.

Judge Lay concurred on the theory that the Commis-

sion had "substantially complied" with the statute, though he added (App. C, p. 32a): "I have difficulty in rationalizing that the Commission has in fact made a deliberate choice as directed."

Judge Van Pelt dissented on the ground that the Commission had promulgated a rate "which admittedly has been established without consideration of the factors which the Congress said shall be considered," and that in his opinion the order should have been set aside and remanded for the Commission "to make the determination in this proceeding in the manner the Congress intended." (App. D, pp. 35a-36a).

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented by this appeal is vitally important to these Appellants because of the effect which the Commission's order will have on the economies of our states and the welfare of the entire country. The shippers and receivers of our states have been seriously burdened in the past because of car shortages (*supra*, pp. 5 & 8), and the order of the Commission which is the subject of this appeal would seriously aggravate the car supply problem by reducing the daily rate for the use of a freight car.

We do not ask this Court to decide what impact the prescription of time/mileage rates would have on car supply. That was—and still is—a matter for which the Commission, in the exercise of its expertise, is responsible. In the 1966 amendment of Section 1(14)(a), Congress directed the Commission to give consideration to

car supply "in fixing such compensation to be paid for the use of any type of freight car;" and to make matters doubly clear it also provided that compensation should be determined "on the basis of such consideration." The legislative history emphasizes the critically important relationship between per diem rates and car supply, and Congress clearly intended that the Commission comply with the express language of the statute requiring that, in issuing any order fixing rates for the use of freight cars, car supply factors be given full consideration. (House Report No. 1183, *supra*, p. 8)

Yet the Commission has here prescribed car hire rates which would substantially *reduce* the per diem component. (*supra*, p. 11). Furthermore, it is conceded by the Commission and by the Court below that the order reducing per diem rates did not reflect any consideration of the effect that the prescribed time/mileage basis would have on car supply. Therefore, the order is in direct conflict with the specific directive of the statute.

The opinions of Judge Robinson and Judge Lay rely, in different ways, on the fact that the Commission is conducting a separate proceeding—the so-called *Incentive Per Diem Charges* proceeding, *Ex Parte 252 Sub. No. 1*. (App. B, p. 20a; App. C., p. 33a). But the new car hire rates on a time/mileage basis, with substantial reduction in the daily rates, have been prescribed for application *immediately*—not sometime in the future in conjunction with whatever additional elements may be prescribed in some future order in the *Incentive* case. It was precisely this kind of change to a new time/mileage

basis of car hire rates that Congress expressly provided must be preceded by, and based upon, consideration of, the total public interest in adequate car supply.

Consideration of the impact of new time mileage rates is of critical importance, when, as the Commission has recently recognized, car shortages have now become so severe as to constitute an emergency. On April 17, 1969, the Commission entered an order finding:

> "That there are acute shortages of freight cars throughout the country; that certain carriers are unable to furnish an adequate supply of freight cars to shippers located on their lines; that these shortages of freight cars are impeding the movement of many commodities; . . . that an emergency exists requiring immediate action . . . ." (I.C.C. Service Order No. 1023)

In light of this emergency, the Commission ordered shippers and receivers to pay up to $50.00 per day for detention of a freight car beyond specified time limits.[6] On June 5, 1969, the Commission denied reconsideration of its order because it "was predicated on a finding of an extreme shortage of freight cars throughout the nation, which constitutes an emergency . . . , [and] that this emergency still exists . . . ." Yet, at the same time that the Commission has increased the daily cost of holding cars idle to shippers and receivers, the Commission's order which is the subject of this appeal would reduce the daily cost to railroads which rent those cars. Given

[6] The shipper can avoid such a charge only by returning the car to the railroad. But once the car is in the possession of the railroad, the regular per diem rate applies no matter how long the railroad holds the car before returning it to its owner.

the fact, as the Commission has found, that car shortages have already assumed emergency proportions, this appeal from an order which would make the car supply problem even worse presents a question which is clearly substantial and should be heard by this Court.

The questions raised by this appeal are important for a further reason—apart from the immediate adverse impact which the Commission's order will have on car supply. The 1966 amendment to Section 1(14)(a) was the culmination of some fifteen years of concerted effort by the States and others to obtain definitive legislative authorization of additional power for the Interstate Commerce Commission to deal with the problem of car shortage. The Commission has responded to the passage of that amendment by giving it an unwarrantedly restrictive interpretation which is at war with the words of the amendment and the Congressional intent. The Commission has construed a statute which directs it to consider car supply in such a way as to preclude it from considering car supply in this so-called "basic per diem proceeding," although "basic per diem" undeniably falls within the statutory category of "compensation to be paid for the use of any type of freight car." Moreover, the Commission has interpreted the statute as preventing it from even considering the effect its orders will have on car supply, such as the adverse impact of time/mileage on car utilization. It can prescribe an incentive additive "only if the evidence warrants a determination that an inadequacy exists," *Incentive Per Diem Charges*, 332 I.C.C. 11, 13 (1967); but it cannot take steps to prevent

the inadequacy from coming into existence. The Commission thus reads Section 1(14)(a) as authorizing a pound of cure in some future proceeding but simultaneously prohibiting even the consideration of an ounce of prevention now.

The three-way division within the three-judge District Court below does not resolve the issues raised by the Commission's construction of the statute. While one judge agreed with the Commission's interpretation (App. B) the dissenting judge concluded that the time/mileage basis was established "without consideration of the factors which the Congress said shall be considered." (App. D, p. 35a) The decisive opinion of Judge Lay, far from resolving the conflict, only serves to obscure it since he resolved the matter by suggesting that although the Commission had not "made a deliberate choice as directed," it had nonetheless "substantially complied with the mandate of the statute." (App. C, p. 32a).

In light of the effort which went into passage of the 1966 amendment of Section 1(14)(a), the resulting Congressional direction of responsibility to the Commission for consideration of car supply matters, the Commission's patent misreading of the statute, and the lack of any clear agreement on the part of the three-judge court below as to the proper interpretation of that Section, the public interest requires that this important statutory issue be resolved by this Court.

CONCLUSION

For these reasons, this appeal presents a substantial question in the administration of the Interstate Commerce Act, and probable jurisdiction should be noted.

Respectfully submitted,

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